Office-Supreme Court, U.S.
FILED
MAR 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1475

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

DAVID WYLLIE and PHILLIP HIGHT,
Petitioners,
vs.
EDWARD LEE DUNN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOSE J. DAVIE
1026-4th Ave., North
Nashville, TN. 37219
(615) 256-6119
Counsel for Respondent Dunn

HEMPHILL'S CREATIVE PRINTING, 841 MAIN STREET, NASHVILLE, TENNESSEE 37206 615/256-6777

TABLE OF AUTHORITIES

PAGE

Landrigan v. Warwick (1980, CA R1) 628 F2d 736, citing Antieau, Federal Civil Rights Acts . . . 1

Cline v. Brusett (1981, CA9 Mont) 661 F2d 108 2

Rubin v. O'Koren (1980, CA5 Ala) 621 F2d 114, on reh (CA5 Ala) 644 F2d 1023 2

Leigh v. McGuire (1979, CA2 NY) 613 F2d 380, vacated on other grounds 446 US 962, 64L Ed 2d 820, 100 S. Ct., 2935 2

Moore v. El Paso County (1981, CA5 Fla) 660 F2d 586 3

Miller v. Smith (1980, CA5 Tex) 615 F2d 1037, reh gr (CA5 Tex) 625 F2d 43 4

Payton v. N. Y., 445 U. S. 573 affirming the case cited in 626 F2d 753 4

No. 80-1608. Argued February 24, 1982 - Decided June 21, 1982 4

APPENDIX A:

Affidavit of Ramsey Leathers, Supreme Court Clerk for the State of Tennessee A-1,2

REPLY BRIEF AND ARGUMENT

The Respondent reiterates and adopts the entire record of this case, and especially, the decision of the Sixth Circuit Court of Appeals as if written verbatim herein; and will insist that the said decision of the Sixth Circuit Court of Appeals was the proper decision and conclusion to be reached, based on the facts, proof and the law of the United States of America.

This Respondent takes issues with Counsel for Petitioners in that, the majority of the Federal Appellate Courts have held that a citizen of the United States shall enjoy: "FREEDOM FROM MALICIOUS PROSECUTION; MALICIOUS ABUSE OF PROCESS: UNLAWFUL ATTACHMENT."

> "Some Courts have ruled that persons are not protected from malicious claims through §1983 actions, but the better view is to the contrary. Landrigan v. Warwick (1980, CA1 RI) 628 F2d 736, citing Antieau, Federal Civil Rights Acts."

The question of when a Federal cause of action accrues is a matter of Federal, not state law. Cline v. Brusett (1981, CA9 Mont) 661 F2d 108; Rubin v. O'Koren (1980, CA5 Ala) 621 F2d 114, on reh (CA5 Ala) 644 F2d 1023.

"A cause of action under §1983 accrues when plaintiff knows or has reason to know of the injury which is the basis of the action. Rubin v. O'Koren (1980, CA5 Ala) 621 F2d 114, on reh (CA5 Ala) 644 F2d 1023."

"However, there is no doubt that in the appropriate circumstances a federal court has the power to toll a state's statute of limitations in a §1983 action. In determining whether it is appropriate to toll a statute of limitations, the court must balance its interest in vindicating federal rights and the desire not to unduly interfere with the legitimate activities of the state. The court must also consider the diligence of the plaintiffs in the pursuit of their claims. Leigh v. McGuire (1979, CA2 NY) 613 F2d 380, vacated on other grounds 446 US 962, 64 L Ed 2d 820, 100 S. Ct. 2935."

"The Court of Appeals for the Fifth Circuit has noted that a

> state's tolling rule will be applied in §1983 actions unless it is inconsistent with the federal constitution or with a federal policy. Moore v. El Paso County (1981, CA5 Fla) 660 F2d 586; Rubin v. O'Koren (1981, CA5 Ala) 644 F2d 1023."

The record shows that the Petitioners were persistent in trying to convict this Respondent from December 27, 1978, up and until June 2, 1980, approximately (16) sixteen months from the date of the arrest.

The Petitioners impaired the Respondent's rights from making his claim in the Federal Courts more than one (1) year from the date of the arrest. (See Affidavit of Ramsey Leathers, Supreme Court Clerk for the State of Tennessee. (See Appendix A-1 and A-2. This Respondent filed his complaint in this lawsuit on August 27, 1980.

> "The Fifth Circuit has held that in the appropriate circumstances the federal courts do not have to adhere to tolling provisions which are part of state statutes of limitations.

> For example, when it is evident that a prisoner has full access to the federal courts, and there is no claim of proof that the state has impaired that freedom, a state tolling statute is not mandated for the federal district court. Miller v. Smith (1980, CA5 Tex) 615 F2d 1037, reh gr (CA5 Tex) 625 F2d 43."

This Respondent will further call the Court's attention to its decision affirming the case of Payton v. N.Y., 445 U.S. 573 affirming the case cited in 626 F2d 753, holding:

> "A decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where a case would be clearly controlled by existing retroactivity precedents. Hence, Payton is to be applied retroactively to respondent's case. No. 80-1608." Argued February 24, 1982 - Decided June 21, 1982.

This Respondent, therefore, submits that the Sixth Circuit Court of Appeals rendered a correct opinion, and this Respondent requests that this Honorable

Court deny the Petitioner's Petition to Appeal from the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

MOSE J. DAVIE
1026-4th Ave., North
Nashville, TN 37219
(615) 256-6119

Counsel for Respondent Dunn

COURT OF CRIMINAL APPEALS
STATE OF TENNESSEE
SUPREME COURT BUILDING
NASHVILLE, TN 37219

Ramsey Leathers
Clerk

July 8, 1982

IN RE:

STATE OF TENNESSEE
vs.
EDWARD LEE DUNN

Appeal No. 79-7-III
Sumner County
No. 1287 Below

I, Ramsey Leathers, Clerk of said Court, do hereby certify that:

Edward Lee Dunn was arrested Dec. 27, 1978;

Edward Lee Dunn was tried in the General Sessions Court of Sumner County, Tennessee, and convicted on January 19, 1979;

Edward Lee Dunn was tried de novo in the Criminal Court of Sumner County, Tennessee, on April 10, 1979, and convicted;

The case was reversed and dismissed by the Court of Criminal Appeals on March 28, 1980;

The State of Tennessee filed an application for permission to appeal from the decision of the Court of Criminal Appeals on April 28, 1980;

The Tennessee Supreme Court denied the State's application for permission to appeal, the Court concurring in the results only, on June 2, 1980;

as appears of record now on file in my office in the above styled case.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 8th day of July, 1982.

/s/ Ramsey Leathers

RAMSEY LEATHERS, Supreme Court Clerk

S-E-A-L